on *selling*. But inasmuch as all the added powers and privileges the patentee obtains are derived from the act that gives him "the exclusive right to *make, use,* and *vend,*" a power to impose similar conditions and limitations must of necessity exist where the exclusive right to vend is exercised as where the patentee exercises the exclusive right to *use*. Perhaps the court has receded from its former position in the Dick case and now refuses to supplement to the personal obligation that may be imposed upon a vendee by contract an equitable constructive obligation on all those that take with notice of the restrictions or conditions. As has been intimated before, the patent act does not expressly endow a patentee with the extraordinary power of being able to impose a servitude on his goods analogous to burdens on land. Nor does this power seem to be reasonably incidental to the express powers and the court is justified in refusing to give patented articles the status of land and thus bind strangers by mere notice.

The principal case dealing as it does merely with the personal right against the party who contracted appears to be sound. For endowing patented articles with immunity from the objection of monopoly is in line with the general policy of the law in encouraging inventions. And as the law has granted the patentee a monopolistic right of vending, it may be considered as fairly incidental to hold that an agreement restricting the price of resale is valid.

M. H. L.

ORAL ASSENT BY THE BANK OF PRESENTMENT TO THE DIRECTION OF ITS DEPOSITOR TO PAY HIS NOTE HELD BY IT FOR COLLECTION AS DISCHARGING THE INSTRUMENT.

The decision of the New York Court of Appeals in the recent case of *Baldwin's Bank of Penn Yan v. Smith* is novel, striking and of great importance in the practical workings of the business community. The holder of a note payable at the W. bank sent it before maturity to that bank "for collection and remittance." On the due day the maker telephoned to the bank and, on being informed by the president that the note was there, directed that it be paid, and was told that that would be done. Seven days later the bank failed without having remitted to the holder, or made a transfer of credits, or marked the note or done anything further to evidence payment. At all times the maker had sufficient funds

in the bank to take up the note. In an action on the note by the holder against the maker, it was *held,* that (1) the W. bank was the agent of the holder and not of the maker; (2) the holder must bear the loss caused by the negligence of its agent; and (3) the note was paid.[1]

The note being payable at a bank is equivalent to an order on the bank, and the relation of the parties is therefore similar to that of the parties to a check.[2] It is pointed out by the court that the commonly accepted doctrine which makes the bank the agent of the drawer of a check "to hold or to pay his money as he directs" can not bear analysis.[3] That the bank does not pay the drawer's money, that it merely liabilitates itself on its implied contract with the drawer, by refusing to pay its own money at the direction of the drawer, whether the latter has deposited sufficient funds before or after presentment, is asserted on unimpeachable authority by the whole court in this case.

That the collecting bank is in fact the agent of the holder can not be reasonably contested. If the holder had sent the note to his own private general or special agent for collection, would the maker be justified in refusing to pay such agent? True, his having sufficient funds in the bank on the due day is equivalent to a tender,[4] but the maker being the party primarily liable, is not thereby discharged.[5] If such private agent had presented the note at the bank of presentment on the due day, the maker would clearly be liable to costs if payment were refused. Then, if the holder chooses as his agent the bank which is the depository of the maker, is it reasonable to suppose that his appointment is a nullity?

The question arises, however, when did the bank become the agent? The majority opinion declares that the agency was constituted by the *sending* of the note; but, except as an act establishing one element of estoppel, the sending of the note could surely not amount to more than an offer for an agency. The minority opinion declares that the agency was constituted by the

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[1] *Baldwin's Bank of Penn Yan v. Smith,* 215 N. Y. 76; 109 N. E. 138. (Collin and Cuddeback, JJ., dissented; and Seabury, J., concurred in result.)

[2] Neg. Instr. Law, § 87 (Consol. Laws, § 147); *Ætna Nat. Bank v. Fourth Nat. Bank,* 46 N. Y. 82.

[3] See Morse on Banks and Banking, vol. 1, pp. 700, 442.

[4] Neg. Instr. Law, § 70 (Consol. Laws, § 130).

[5] *Wolcott v. Van Santvoord,* 17 Johns. 248.

receipt and detention of the note; and this, although involving an acceptance of an offer by silence, commends itself as more logical, in view of the peculiar fiduciary obligation imposed by business custom upon the banker.

The agency once established, the vital question arises, Was the agent paid? It is to this point that the dissenting opinion of Collin, J., is directed. The bank was the holder's agent to receive payment; in that capacity it could do no more. If A appoints as his agent B's debtor, and B authorizes his debtor to pay A, which authority is not carried out, it may safely be said, as a general proposition, that A has not been paid. Negligence can not discharge an instrument where presentment was made in reasonable time, as was the case here; and the negligence in making payment, if none was made, consisted in the omission of a duty owing to the maker.[6]

But the negligence in the principal case was of such nature as to work an estoppel. This must be taken as the holding of the court on this point. Says Miller, J.: "By sending the note to the Watkins bank . . . the plaintiffs . . . led the defendants to suppose that their credit had been applied *pro tanto* to the payment of the note, and lulled them into taking no further measures either to pay the note or to draw upon the credit thus appropriated."[7] If, in the supposititious case, *supra,* B's debtor, A's agent, tells B that A will be paid, and the circumstance of the parties is such that B can reasonably rely on his debtor's word, and as a result of such reliance B suffers loss in having the debt unpaid, will not A be estopped by the conduct of his agent to claim from B?[8] Should it be contended that the bank in making the representation was not acting within the agency conferred by the holder, the reply may be made that the bank was the holder's agent *to take* payment and that extrinsic facts surrounding the agency and giving the agent a power peculiar to him are sufficient to base an *estoppel in pais* against his principal.[9]

The difficulty here is that the representation was a promise or, at most, an assent. But if the reliance thereon was reasonable, it surely should, under the circumstances, be equivalent to an act. To hold that a depositor acts unreasonably in relying on the

[6] *Sutherland v. First Nat. Bank,* 31 Mich. 230.
[7] 215 N. Y., at 81.
[8] *Griswold v. Haven,* 25 N. Y. 595.
[9] *N. Y. & N. H. R. R. Co. v. Schuyler,* 34 N. Y. 30, 68, *et seq.*

word of his banker, would strike a blow at the very foundation of our commercial institutions. In fact, it may be suggested here that no reliance was necessary, and that the assent accomplished a novation. When the holder sent the note to the bank, he surely assented to have the bank substituted as his debtor in place of the maker; when the maker directed the bank to apply his credit to the note, he surely offered a discharge *pro tanto* of his claim against the bank in return for a promise by the bank to pay to the holder and an assent by the holder to accept the substitution. Thus the assent of the bank consummated the transaction; for the assent of the holder had already been given to precisely such a transaction.

By considerations, perhaps, involving a parity of reasoning, the court was induced to hold that the note was paid. Although not essential to the decision of the case, the manner in which the holding was handed down, and the cogent reasoning and authorities given in its support, will commend it as of binding force. The conclusion is reached on the premise that the act of payment is distinct from evidence of the act, and as long as the act occurred, evidence of it is not important.

The difficulty suggested—*i. e.*, the ascertainment of the fact—is more apparent than real in the case at hand. If the maker had handed money over the counter, and the bank had sent to the holder a bad check, or had made no remittance, the note would clearly have been paid as to the maker;[10] but if the maker had passed a bad check over the counter and had been given a credit memorandum, the note would not have been paid.[11] That is, the evidence of payment failing, the fact of payment would not necessarily fail; and, on the other hand, the evidence of payment established, the fact of payment is not necessarily established.

It is not to be supposed that the bank was to send to the holder the identical money it obtained from the maker, and surely the maker would never be required to do more than place in the hands of the collecting agent sufficient funds to take up the instrument. If the bank already has the sum or an equivalent in its hands, would it not be unreasonable and legally unnecessary to require a transfer and retransfer of the sum in order to constitute payment? *Lex neminem cogit ad vana seu inutilia.* If the

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[10] Morse on Banks and Banking, § 214.

[11] *Smith v. Miller,* 6 Roberts. 157; *Nat. Gold Bank v. McDonald,* 51 Cal. 64.

bank, "in fact, accepted an appropriation of the maker's credit with it in payment of the note, that should constitute payment," and "the acceptance of the maker's verbal order to make the application was an act fully as effective as, *e. g.*, the marking of the note paid."[12]

It is to be observed that there was in this case an acceptance of the verbal order of the maker. Would the court, in the absence of such order and acceptance, entertain the presumption that the bank had performed its legal duty by paying the note?[13] Several statements in the opinion would justify such conclusion. But if, instead of appropriating the maker's credit to the payment of the note, the bank allows him to withdraw his entire deposit, it is very questionable whether the note would be held paid. In fact, sureties on the instrument would probably be discharged, on the theory that the bank has prejudiced them by not taking advantage of the opportunity to make the appropriation.[14] It would, therefore, be more correct, in view of the facts of the principal case, to say that on this point the Court held, that an oral assent given by a bank, holding for collection the note of a depositor, to the depositor's direction to pay it, is sufficient evidence of payment.

A. M.

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[12] 215 N. Y., at 84, 85.

[13] *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82.

[14] *Pitts v. Congdon*, 2 N. Y. 352; *Wright v. Austin*, 56 Barb. 13; *King v. Baldwin*, 17 Johns. 384, 390, 393; *Shutts v. Fingar*, 100 N. Y. 546; *Bank v. Smith*, 66 N. Y. 272.